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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JACKSON GUMISIRIZA,

Defendant and Appellant.

B201027

(Los Angeles County  
Super. Ct. No. LA052423)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Darlene E. Schempp, Judge. Affirmed.

Betty Alice Bridgers for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E.  
Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

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In May 2006, Judy Burnett was brutally attacked while sleeping in her apartment. A jury convicted her boyfriend Jackson Gumisiriza of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664, 187, subd. (a)).<sup>1</sup> The jury also found true the special allegations that he used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), and inflicted great bodily injury under circumstances involving domestic violence (§ 12022.7, subd. (e)). The jury also found Gumisiriza guilty of first degree burglary (§ 459). He contends on appeal that: (1) he was denied effective assistance of counsel; (2) the trial court erred by acting as an expert and by allowing police officers to offer unqualified expert testimony; and (3) there was insufficient evidence to support the verdict. We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

We review the evidence in accordance with the usual rules on appeal. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Gumisiriza and Burnett began dating in 2001. In 2004, the two had a child together. They lived apart, against Gumisiriza's wishes. The problems began in their relationship after their son was born. Gumisiriza doubted that the child was his and he refused to pay child support. Burnett and Gumisiriza had constant discussions and arguments about money. Burnett felt that Gumisiriza tried to control her by insulting and criticizing her.

On one occasion in 2003, Gumisiriza opened Burnett's personal e-mail account and read her e-mail. Gumisiriza then became furious and accused Burnett of having an affair. Gumisiriza pulled Burnett's hair and held a knife to her neck while threatening to kill her. Burnett did not report this incident to the police for fear that nothing would be done, and she continued to have a relationship with him.

In May 2006, a week before the attack, Gumisiriza told Burnett that if she filed for child support he would kill her and their son and flee the country. He had made similar statements to Burnett on previous occasions. A few days later, Gumisiriza found out that

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<sup>1</sup>

All further statutory references are to the Penal Code unless otherwise noted.

Burnett was e-mailing a male friend in London. Gumisiriza threatened Burnett, warning: “I am planning on what to do to you, and you will not like it.”

On May 13, 2006, Burnett wanted to end the relationship. She told Gumisiriza that she was tired of him and asked that he return the key to her apartment. Gumisiriza refused. He believed Burnett’s friend from London was in the United States and he accused Burnett of being unfaithful. The two argued and were arguing when Gumisiriza left Burnett’s apartment around noon. Around 9:30 p.m., Burnett went to bed alone, but she locked her bedroom door because she thought Gumisiriza might come over and she did not want to deal with his “violent tendency.”

At the time of the attack, Burnett shared an apartment with her mother, stepfather, adult daughter, and her infant son. Around 10:00 p.m. on May 13, 2006, Burnett’s stepfather, Arthur Hanney, was smoking a cigarette on the apartment balcony. Hanney had seen Gumisiriza on numerous previous occasions, and while he was smoking on the balcony that night, he saw Gumisiriza enter the apartment carrying a gym bag. Gumisiriza came in the front door of the apartment, dimmed the kitchen lights, and entered a bathroom that was connected to Burnett’s bedroom. Hanney went into his bedroom shortly thereafter. He did not hear any loud noises or screams.

Burnett’s adult daughter, Veronica Guzman, came home later that evening. She did not have a key to the apartment, so she called Hanney to let her in. Hanney told Guzman that Gumisiriza was in Burnett’s bedroom.<sup>2</sup> Guzman wanted to use her mother’s computer, but realized after a few minutes that she needed a password. When she went into her mother’s bedroom to ask for the password, she saw Burnett on the floor. She turned on a light and then realized there was a pool of blood next to her mother’s head. Burnett’s eyes were open, but she could not speak. Guzman and Hanney called 9-1-1. When police arrived and searched the crime scene, they found no evidence of a forced

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<sup>2</sup>

Guzman also testified that she had seen Gumisiriza at the apartment earlier that day before she left for work.

entry and discovered Burnett's purse untouched in the bedroom. The purse contained \$111 in cash and a payroll check for over \$1,300.

The paramedics took Burnett to the hospital. Burnett had holes in the top of her skull and her frontal lobe was severely fractured. While she was at the hospital, Los Angeles Police Officer Mark Gordon communicated with Burnett by asking her to wiggle her toes in response to yes or no questions. After asking a few test questions, Gordon asked Burnett if she knew who had attacked her. Burnett indicated she did know, and wiggled her toes to indicate that the attacker was her boyfriend, Jackson. At a much later date, she told Gumisiriza's friends that she never saw the attacker.

Police arrested Gumisiriza that night at his workplace, a residential facility for autistic adults. Although police determined after reviewing medical records that Burnett had likely been attacked with a hammer,<sup>3</sup> they did not find the weapon after searching Gumisiriza's apartment, workplace, and cars. Nor did police find any blood or DNA evidence related to the attack. Security cameras outside of the apartment building were operating on the night of the attack, but there were gaps in the tape. The recording from the cameras did not show Gumisiriza entering or exiting the building.

A few days after the attack, Gumisiriza sent Burnett a letter from jail. Gumisiriza asked Burnett to "stand on [her] faith" and admit that she never saw her attacker.<sup>4</sup>

Burnett was confined to a hospital for two months. She spent another month at a rehabilitation center. Because the attack damaged her skull, she had to undergo cranial facial reconstruction surgery. At the time of trial in March 2007, Burnett still had scars from the attack. Her left eye, speech, and memory also remained impaired.

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<sup>3</sup> One of the officers described the hammer they searched for as "a typical household hammer with a brown handle and then the two pryer edges like on the other end to pry nails out."

<sup>4</sup> The prosecution argued that Gumisiriza's letter evidenced his guilt because he could not have known that Burnett did not see her attacker.

Gumisiriza testified at trial against the advice of his counsel. Gumisiriza said he first met Burnett in 2003. After their son was born, Gumisiriza helped out financially by buying groceries and milk, and he gave Burnett \$300 in cash each month. Gumisiriza claimed he and Burnett never argued about child support. He also maintained that he never confronted Burnett about being unfaithful or her e-mail communications. According to Gumisiriza, he never argued with Burnett or threatened her. Although Hanney testified that he had seen Gumisiriza numerous times, Gumisiriza first testified that he did not know who Hanney was, and later testified that he did not remember if he had ever seen Hanney before. Gumisiriza said he had been to Burnett's apartment fewer than 10 times and denied having keys to it.

Gumisiriza testified that he did not visit Burnett's apartment on May 13, 2006, and did not attack her. Gumisiriza testified that Burnett visited his apartment that day. After she left, Gumisiriza said he remained at home for a few hours with two of the autistic adults he cared for, then went to work. Gumisiriza testified he was at the residential facility he worked at until around 6:00 p.m. when he left to buy a phone card. He returned to the facility within 15 minutes. At 8:00 p.m., he gave the residents medicine and put them to bed. Gumisiriza then called his apartment, spoke to his roommate, and tried to make an international call around 10:00 p.m. After making calls, he slept until shortly after midnight, when he woke to answer the facility telephone. Within two hours, police arrived and arrested him. Gumisiriza admitted that he wrote a letter to Burnett while in jail, but claimed that portions of the letter were altered or added.

The jury found Gumisiriza guilty of attempted willful, deliberate and premeditated murder and first degree burglary. The jury also found true the special allegations that he personally used a deadly weapon and inflicted great bodily injury under circumstances involving domestic violence.

Gumisiriza moved for a new trial based on insufficiency of the evidence. In support of the motion, Gumisiriza submitted the declaration of a video production expert stating that in his review of the apartment surveillance tapes from May 13, 2006, he did not see anyone resembling Gumisiriza entering the building between 6:00 and 11:00 p.m.

The expert declared that it was “highly unlikely” the cameras would have missed Gumisiriza entering or leaving the building. Gumisiriza also submitted a declaration from his roommate stating that Gumisiriza called her during the early evening of May 13, 2007<sup>5</sup> and again at 10:00 p.m. The roommate said that during both calls Gumisiriza represented he was at work. The trial court denied Gumisiriza’s motion.

The court sentenced Gumisiriza to state prison for life plus five years. This appeal followed.

## **DISCUSSION**

### **I. The Record Does Not Indicate That Gumisiriza Was Denied Effective Assistance of Counsel**

In his opening brief, Gumisiriza sets forth what can only be described as a laundry list of complaints about his trial counsel. To be exact, he states as follows: “The following is a list of problems, relating to defense counsel, encompassing several areas in this case: a. Break down of communication with client and not coaching client to testify; b. Not introducing witnesses pursuant to client’s request; c. Stipulating in regards to medical testimony and tape testimony, that appeared to be key evidentiary issues and no experts presenting in regards to these vital issues, as well as no authentication; d. No time line introduced; e. No diagram of the scene of the crime or sight line of the alleged eye witness; f. No cell phone records, utilizing towers sought or introduced; g. do not know if jurors were examined as the record does not reflect same; h. no blood spatter expert to attempt determination of positions, sleeping or not sleeping or anything at all; i. No expert as to victim’s ability to communicate effectively while under drugs and/or in a coma; j. no handwriting expert consulted or called in regard to letter; k. Summation was not on point; l. Failed to interview or attempt to interview the eye witness; m. did not

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<sup>5</sup> The May 13, 2007 date appears to be a typographical error. May 13, 2006 was the date of the attack.

address the problem of language and cultural differences once [Gumisiriza] decided to testify.”<sup>6</sup>

Gumisiriza does not set forth a further analysis of these allegations nor does he point out any facts that back them up except for the bald assertion that “[t]rial defense counsel did not care to discuss or make a statement in regards to any matter concerning this case. Please incorporate by reference the Clerks Transcript pages 000176 to 000201 and read Clerks Transcript 000191 and 000192 wherein it stated that [Gumisiriza] would have been on the surveillance tape of entries and exits to victim’s building, at the times alleged.” For a number of reasons, we must reject these arguments.

In order to establish ineffective assistance of counsel, an appellant must show that counsel’s representation was deficient, in that it fell below an objective standard of reasonableness when judged by professional norms. He must also demonstrate prejudice, that is, but for counsel’s failings the result would have been more favorable to the defendant. (*In re Cudjo* (1999) 20 Cal.4th 673, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.)

Gumisiriza’s perfunctory assertions do not even come close to meeting these standards and must be summarily rejected. Should he choose to set forth some facts or analysis in support of his contentions at a later point, he is not prejudiced from doing so by habeas corpus.<sup>7</sup>

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<sup>6</sup> At oral argument, Gumisiriza’s counsel claimed evidence supporting his ineffective assistance of counsel argument was presented in the motion for new trial. This is inaccurate. The record reflects counsel’s motion for new trial was based solely on insufficiency of the evidence.

<sup>7</sup> In Gumisiriza’s reply brief, he sets forth some factual basis for his contentions and is a bit more thoughtful in his reasoning. However, he cannot assert new facts or claims for the first time in a reply brief. (*City of Merced v. American Motorists Ins. Co.* (2005) 126 Cal.App.4th 1316, 1328.) If the rule were otherwise, it would allow him to sandbag the opposing side.

## **II. The Trial Court Did Not Act as an Expert**

Equally as unavailing and also completely devoid of evidentiary support in the record is Gumisiriza's contention that the trial court acted as an expert. Here are the factual bases for the claim: (1) While Detective Bernard Pulliam was testifying about the video footage from the apartment building's surveillance cameras, he indicated that the recordings were from a number of different cameras around the building. He said the footage jumped from one camera to another and that the tape had gaps in it. The prosecutor then asked, "And what do you mean there are gaps in the tape?" Gumisiriza's counsel objected that this question called for inappropriate expert testimony. The court asked counsel to approach *at side bar*. There, while out of the presence of the jury, the court said, "Well, gaps in the tape, that is Mr. Penzin's [the prosecutor's] word, and so I don't know exactly what you mean by -- why would this be outside his area of expertise? Anybody can look at the tape and tell there is a gap."; (2) When ruling on the motion for new trial the court stated that the police officer testified that the security cameras "were down." That's it.

There are any number of reasons why this argument is wholly meritless, starting with it being fundamental that before a witness can be considered to have acted as an expert, he or she must testify in front of the jury. The fine trial judge here did nothing of the sort and nothing more need be said about this unfounded claim.

## **III. The Police Officers Did Not Offer Improper Expert Testimony**

Gumisiriza next claims that the police officers who testified at trial improperly offered expert opinions on medical, psychological, weapons, and electronic issues. This contention does not withstand analysis.

Gumisiriza supports this claim with only one citation to the record -- from the preliminary hearing. This was never admitted at trial. So, even if that particular testimony reflected an unqualified expert opinion, it had no affect on the outcome of the trial. Further, we agree with the Attorney General that Gumisiriza waived any claims regarding the police officers' testimony because he never objected to any of it. (Evid. Code, § 353; *People v. Williams* (1997) 16 Cal.4th 153, 194.)



Moreover, we have reviewed the record and find it does not demonstrate that the police officers gave unqualified expert testimony. For example, Officer Gordon's description of communicating with Burnett by wiggling her toed did not include an expert opinion regarding the reliability of the communication; he simply described what transpired. As to electronics issues, defense counsel successfully prevented Detective Pulliam from offering what she considered improper expert testimony, and the parties agreed to a stipulation instead.

Likewise, the record does not indicate that police officers opined that a hammer was used in the attack. Instead, Pulliam testified that he reviewed police reports from the crime scene and Burnett's medical records, and from those documents initiated a search for a typical hammer. Pulliam's testimony was not his opinion as to the probable attack weapon. It was a statement about what he did after examining matters in the reports he reviewed. Gumisiriza's arguments are unavailing.

#### **IV. Sufficient Evidence Supported the Convictions**

Gumisiriza contends that his convictions were not supported by sufficient evidence. When such a challenge is made, we review the entire record in the light most favorable to the judgment to determine whether a reasonable jury could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) We do not reweigh the evidence or resolve evidentiary conflicts. "A reversal for insufficient evidence 'is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' ' the jury's verdict. [Citation.]" (*Ibid.*)

When the prosecution relies upon circumstantial evidence to make its case, "[w]e 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation.] 'Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]' [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a

reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal. [Citation.]" (*People v. Zamudio, supra*, 43 Cal.4th at pp. 357-358.)

Gumisiriza primarily argues that there was insufficient evidence for the jury to identify him as the person who attacked Burnett. We disagree and conclude that substantial circumstantial evidence identified Gumisiriza as the attacker. Burnett testified that Gumisiriza threatened to kill her only days before the attack, and that he also threatened to do something to her she would not like. The two had been arguing about Gumisiriza's child support and Burnett's fidelity. On the day of the attack, Gumisiriza and Burnett argued and Gumisiriza refused to give up the key to her apartment. On the evening of the attack, Hanney saw Gumisiriza go into the apartment and enter a bathroom connected to Burnett's bedroom. A few hours later, Guzman found Burnett lying on the floor in a pool of blood from her severe head injuries.

Although Gumisiriza testified he was not there, the jury could reasonably have disbelieved him and instead concluded he attacked Burnett just as he had threatened he would. Even if the jury determined that Burnett's unconventional hospital identification of Gumisiriza as her attacker was entirely unreliable, other circumstantial evidence supported a conclusion that Gumisiriza was the attacker. (*People v. Barnum* (1957) 147 Cal.App.2d 803, 805 [the identity of a criminal offender may be established entirely by circumstantial evidence].)

Insofar as Gumisiriza also argues there is insufficient evidence of motive or intent to kill, his arguments are unavailing. First, though there was plenty of evidence as to motive, it is not an element of the crime of murder and need not be proven to support his conviction. (*People v. Edwards* (1991) 54 Cal.3d 787, 814.) Second, there was substantial evidence of intent to kill. Gumisiriza went to Burnett's apartment at night, at a time when Burnett was sleeping. Days before the attack, he threatened to kill Burnett and to do something to her she would not like. The manner of the attack also suggested intent to kill. Indeed, Burnett was attacked while she was sleeping, with an instrument

that both fractured and punctured her skull, pointing to a “preconceived design” to kill her. (*People v. Martinez* (2003) 113 Cal.App.4th 400, 412.)

In support of his insufficient evidence contention, Gumisiriza argues the outcome at trial may have been different if conflicting evidence regarding his whereabouts and the operation of the security cameras had been introduced. In making this argument, Gumisiriza concedes that such evidence was not presented. Not only are we unable to reweigh conflicting evidence in considering an appeal, *potential* evidence cannot support Gumisiriza’s claim of insufficient evidence.

Generously construing Gumisiriza’s argument, he also challenges the sufficiency of the evidence supporting the jury’s finding on the personal use of a deadly and dangerous weapon enhancement. (§ 12022, subd. (b)(1).) However, instruments that have nondangerous uses, such as hammers, are “deadly and dangerous” when they are capable of being used in a dangerous or deadly manner, and the evidence shows the attacker intended to use the instrument in a dangerous and deadly way. (*People v. Burton* (2006) 143 Cal.App.4th 447, 457.) The jury could reasonably infer from Burnett’s immediate injuries—a severely fractured skull and holes created in the top of her skull—that a deadly and dangerous weapon was used in the attack. (*People v. Alvarez* (1996) 14 Cal.4th 155, 225.)

To the extent that Gumisiriza contends his motion for new trial was improperly denied, we must also reject the claim. Sufficient evidence supported the convictions.

### **DISPOSITION**

The judgment is affirmed.

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BIGELOW, J.

We concur:

COOPER, P. J.

RUBIN, J.